SHEPPARD MULLIN
SHEPPARD MULLIN RICHTER & HAMPTON LLP
ATTORNEYS AT LAW

17th Floor | Four Embarcadero Center | San Francisco, CA 94111-4106
415-434-9100 office | 415-434-3947 fax | www.sheppardmullin.com

December 30, 2004

Ms. Paula Higashi, Executive Director
COMMISSION ON STATE MANDATES
980 9th Street, Suite 300
Sacramento, California 95814
Facsimile: (916) 445-0278

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

RECONSIDERATION OF PRIOR BOARD OF CONTROL DECISION ON:	Case Nos.: 04-RL-3929-05; 04-RL-3759-02; 04-RL-3760-03; 04-RL-3916-04
Statutes 1980, Chapter 1143 Claim No. 3929	***Regional Housing Needs Determination-Councils of Governments***
Directed by Statutes 2004, Chapter 227, Sections 109-110 (Sen. Bill No. 1102)	**BRIEF OF THE CALIFORNIA BUILDING INDUSTRY ASSOCIATION ("CBIA") IN RESPONSE TO COMMISSION'S NOTICE OF RECONSIDERATION**
Effective August 16, 2004	HEARING PATE: March 31, 2005

LETTER BRIEF ON BEHALF OF THE CALIFORNIA BUILDING INDUSTRY ASSOCIATION ("CBIA")

Dear Ms. Higashi:

We appreciate the opportunity to submit briefing on behalf of the California Building Industry Association ("CBIA") in connection with the Commission's reconsideration of this matter. Pursuant to the Commission's notice of reconsideration, we understand that the Commission has been directed by SB-1102 to reconsider whether the costs of complying with the State mandate that regional councils of government ("COGs") determine regional housing needs "in light of ... the existence of fee authority pursuant to [new] section 65584.1 of the

Government Code," CBIA respectfully submits that this new Government Code section 65584.1, which purports to authorize the pass-through of COG costs, should not be given undue weight by the Commission in conducting this review. CBIA is particularly concerned that this new enactment (which has not yet undergone judicial review) should not be deemed to establish any valid legal authority for COGs to attempt to pass on the costs of this State-mandated housing determination process to the builders or buyers of new homes.

Amicus CBIA is a statewide nonprofit association, with nearly 6,000 members active in all aspects of the home building industry throughout California. CBIA, through its members and associates, represents more than 500,000 people employed as homebuilders, contractors, suppliers, and allied professionals such as architects, attorney, engineers, and land use planners and designers, committed to meeting the state's housing needs and expanding home ownership opportunities for all Californians.

The homebuilding industry in California, and the CBIA as its representative, have supported efforts to assure that the diverse communities throughout the state take adequate measures to plan for and provide opportunities to address the housing needs of the people of California. In recent years, State and local planning agencies as well as the homebuilding industry have been particularly concerned with the challenges of attempting to meet needs for "affordable housing" throughout California and to reduce the barriers to wider distribution of housing which may be affordable to all segments of the residential community. California has recognized the State-wide importance of these objectives to California as a whole, through repeated legislative enactments intended to strengthen the Housing Element as a component of the general plan process and to bolster the process of planning to meet housing needs on a regional basis (e.g., Government Code section 65580.) Additionally, the benefits, and the burdens, of this process have been recognized as being of State-wide concern.

CBIA and its members are therefore particularly concerned that the enactment of new Government Code section 65584.1 [added by Section 58 of SB-1 102 (Stats. *2004,* ch. 227)] not serve as a new argument in support of any attempt to foist these State-mandated costs, which are ostensibly for the benefit of the State and regional communities as a whole, onto that fraction of the community which may be involved in building and buying new homes. Any such attempt to single out the builders of new homes and the occupants of those new homes to bear the costs of this State-mandated planning process would encounter numerous constitutional and other legal barriers but would also encounter numerous public policy objections.[1] It would indeed

---

[1] For example, the Legislature has declared: "As a matter of statewide concern it is necessary for the state to limit the amount of various fees charged by local agencies, including, but not limited to charter cities, in order *to* carry out the intent and purpose of Article XIII A of the California Constitution." (Stats. 1981, ch. 914 § 1, enacting former Gov't Code § 54990, now § 66013); *See also, Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854, 867, in which the Supreme Court stated that by interpreting the Mitigation

involve a cruel irony were this new legislation to be construed to allow the costs of State-mandated regional planning, intended to identify housing needs and create opportunities for more and affordable housing, to be passed through cities and counties onto those very members of the community who are involved in trying to meet those needs. Such a counter-productive application would further exacerbate the difficulties of providing affordable housing in California.

Fees and exactions imposed on residential development now contribute significantly to driving up the cost of housing, and making homes less attainable for many Californians. The State of California's Department of Housing & Community Development recently documented this phenomenon in a recent study, entitled *Pay to Play: Residential Development Fees in California Cities and Counties* (HCD, Sacramento, 1999):

> Their widespread use notwithstanding, residential development fees – which constitute the bulk of development: fee revenues – are controversial on at least two counts. The first concerns the high degree of variation between jurisdictions regarding which fees are charged and their amounts. . . . A second issue of concern regarding local development fees concerns their contribution to the high cost of housing. Theory suggests, and some empirical studies demonstrate, that fees contribute directly *to* the higher housing prices, especially during periods of strong housing demand. (*Pay to Play*, pp. 1–2.)

There appears to be little question that the costs imposed by State requirements that regional COGs determine regional housing needs and implement programs to attempt to meet those identified housing needs *are* State mandated costs requiring reimbursement under the California Constitution, article XIII B, section 6. The Commission's 'notice re reconsideration' raised the question whether the enactment of new Section 65584.1 may be deemed to trigger the exception to such reimbursement provided by Government Code section 17556, where local agencies incurring State-mandated costs are deemed to have the legal authority to impose a "fee" to recoup those costs. CBIA submits that new Government Code section 65584.1 does not provide such authority. CBIA specifically objects to any implication that section 65584.1 may be deemed to authorize COGs to pass on their State-mandated costs to homebuilders and homebuyers, by way of new "fees" which may be adopted by cities or counties,

---

Fee Act [Gov't Code § § 66000 et seq.] consistently with the constitutional nexus standards of *Nollan* and *Dolan*, "we serve the legislative purpose of protecting developers from disproportionate and excessive fees, ..."

Government Code section 17556 therefore does not preclude the Commission from finding that the statutory provisions relating to the regional housing needs determination process impose costs mandated by the State, for at least the following reasons:

1. **Regional COGs May Not Impose Costs on Member Agencies:**

The first two sentences of new Section 65584.1 purport to authorize COGs to "charge a fee to local governments" to cover the costs incurred by the COG in complying with the State mandates regarding distribution of regional housing needs. However, any such attempt to charge new costs to member agencies would likely involve invalid impairment or interference with existing joint powers agreements under which the COGs operate. COGs exist as creatures of contractual agreements among member agencies, pursuant to the statutory authority under Government Code sections 6500 et seq., the Joint Exercise of Powers Act. Accordingly, existing COGs can not impose any "fees" or other cost recovery charges upon their member governmental agencies in the absence of some express authority conferred by their existing joint powers agreements, notwithstanding the enactment of new Section 65584.1. New legislation may not impair or add to the terms of such existing contractual arrangements without violating the California Constitution (article I, section 9, "contracts clause").

Moreover, even if COGs were to attempt to take advantage of this new statutory "fee authority" the statute provides no guidance nor any standards as to how such a "cost recovery" fee could lawfully be implemented. The statute merely purports to permit charges sufficient to "cover the projected reasonable actual costs of the council in distributing regional housing needs ...."[2] How could such covered costs appropriately be apportioned among the member agencies of a COG? Per capita? Per surface area? Per *tax* base? Per amount of COG staff time "actually" spent on analysis of each member agency's housing needs? Should uncooperative or non-compliant member agencies be charged more than cities or counties that have readily planned for and zoned appropriate land to meet their regional fair share of housing needs? This lack of any standard for the apportionment and fair allocation of "covered costs" would be magnified and become even more legally significant if the member cities and counties were to try to pass on their "share" of COG planning costs to homebuilders and homebuyers, who may find themselves thus charged with a "share" of costs improvidently or illegally divvied up among the respective cities or counties comprising the COG.

2. **Cities and Counties May Not Impose New "Fees" to Reimburse for State-Mandated Costs Incurred by COGs in Distributing Regional Housing Needs:**

---

[2] This portion of Section 65584.1 also contains internally inconsistent language, e.g., by purporting to authorize fees to cover "the *projected* reasonable, *actual* casts of the council. ..." Even if such "fees" were allowed, the statute is unclear whether the casts to be "covered" are "projected" future costs, or "actual" costs previously incurred by the COG.

The third and fourth sentences of new Section 65584.1 purport to authorize cities and counties to "charge a fee" to "support the work of the planning agency [COG]" for regional housing needs planning "and to reimburse it [the city or county] for the cost of my fee charged by the council of government to cover the council's actual costs ..." and direct that the legislative bodies of cities or counties may impose any such fee pursuant to Section 66016.[3]

However, this statute does not provide a valid basis for cities and counties to pass through costs they may incur for the support of the housing needs work performed by the regional COGs, and particularly this statute would not provide a basis for a valid "fee" (as opposed to a "tax") for several reasons:

A. No Basis for Seeking Reimbursement of Costs Incurred, by Other Agencies:

To the extent that cities and counties in California are deemed to have authority to impose "fees" to reimburse for governmental costs incurred, such fees have been confined to the reasonable costs *or* burdens imposed on the particular city or county imposing the "fee." To the extent that the authority of cities and counties to impose "fees" generally is derived from the "police power" of such cities and counties under the California Constitution, such power is confined to the activities of the city or county within its own jurisdiction (Cal. Const., art. XI, section 7). There is no basis for local agencies in California to impose fees on private property owners or developers to "reimburse" for costs incurred by others. *See, e.g., Price Development Co. v. Redevelopment Agency of the City of Chino* (9th Cir. 1988) 852 F.2d 1123,1126 (no authority for imposition of an 'impact fee' for the purpose of reimbursement of option deposit. paid to agency by prior developer).

B. Violation of California Constitution - No "Fees" for General Governmental Services:,

Article XIII D of the California Constitution, added by voter approval of Proposition 218 in 1996, expressly prohibits the imposition of any fee or charge "for general governmental services" by any governmental agency in California (art. XIII D, section 6(b)(5).) This constitutional prohibition against fees or charges applies where the service to be funded "is available to the public at large in substantially the same manner as it is to property owners." Here, the "service" provided by regional COGs in distributing regional housing needs is "available" to all members of the community on an equal basis. The State has determined that all of California benefits from the appropriate distribution of responsibilities for providing for the

---

[3] Again, this portion of Section 65584.1 refers *to* fees covering the COG's "actual costs" and is inconsistent with the wording of Section 66016, to which it also refers, since Section 66016 provides for those fees to be set on the basis of "estimated costs" to provide services, and for adjusting fees if they "create revenues in excess of actual costs."

housing needs of the various regions of California, and that "the development of a sufficient supply of housing to meet the needs of all Californians is a matter of statewide concern." See, e.g., Government Code section 65913.9, see also, sections 65580, 65589.5(g). The cost burden of providing this generally available governmental service therefore may not be recouped from homebuilders or property owners by means of a "fee."

Similarly, the Constitution also prohibits the imposition of service fees or charges on property owners unless the service is actually used by, or immediately available to, the property owner (art. XIII D, section 6(b) (4).) "Fee or charges based on potential or future use of a service are not permitted."

Any purported "fee" imposed by a city or county to pass through the costs of work performed by the distinct COG entity in complying with an on-going mandate from the State, independent of any individual development activity, would be a "tax" rather than a "fee" and would therefore require appropriate voter approval under the Constitution,

C. Costs of Providing State-Mandated Housing Needs Distribution May Not Be Converted Into Lawful "Fees":

If nevertheless it is contended that cities and counties would be "authorized" by the new legislation to pass through the costs imposed by COGs in the form of "fees" to be imposed, in turn, on homebuilders and new home buyers, then such contention would be in error. The California Supreme Court has recognized two types of "fees" as distinguished from "taxes," which may be imposed without voter approval, development fees and regulatory fees. *Sinclair Paint Co. v. State Board of Equalization* (1997) 15 Cal.4th 866, 875. The proposed pass-through of costs incurred by regional COGs for preparing housing determinations, however, would not meet the criteria for either type of these recognized "fees."

"Development fees" are defined by statute as monetary exactions charged by local agencies in connection with approval of a development project "for the purpose of defraying all or a portion of the cost of public facilities related to the development project." Government Code section 66000(b). The type of mandatory and on-going regional planning costs referenced in new section 65584.1 bear no resemblance to the types of infrastructure improvements, facilities costs and service costs which may otherwise be covered by lawful "development fees" under the California Mitigation Fee Act (Government Code sections 66000 et seq.).

Moreover, any suggested new "fees" for COG housing determination costs would not defray facility or service impacts caused by particular development projects, as required of lawful "development fees." As recently reiterated by the Supreme Court, "as a matter of both statutory and constitutional law, such fees must bear a reasonable relationship, in both intended use and amount, to the deleterious public impact of the development." *San Remo Hotel L. P. v. City and County of San Francisco* (2002) 27 Cal.4th 643, 671 (citations omitted). Although cities and counties may be authorized to charge some fees for their "planning services under the authority of Chapter 3 (commencing with Section 65100)..." pursuant to section 65104 and

section 66014 such fees must be limited to the reasonable cost of providing the services to the particular project or fee payer.[4] Unlike such project-specific;planning costs, however, the costs incurred by COGs for determining and distributing the region's housing needs are incurred independently of any particular development project, and in fact would be incurred by the COG in fulfilling its State mandate to periodically update its housing analysis regardless of the level of development processing, or even in the absence of any development activity. "Fees imposed on developers must be based on the cost of increased services made necessary by the development." *City of Dublin v. County of Alameda* (1993) 14 Cal.App.4th 264,283 (citations omitted,) Since individual development projects would not cause any "cost of increased services" by the COGs in performing the;housing distribution work on a regional basis, any attempt to pass these costs through to developers would not be lawful development fees.

"Regulatory fees" have also been recognized as exceptions to Proposition 13's mandate for voter approval of special taxes in some situations, which are distinct from the current scenario. Government Code section 50076 provides that a "fee which does not exceed the reasonable cost of providing the service or regulatory activity for which the fee is charged and which is not levied for general revenue purposes" will not be considered as a "special tax." In addition, case law further limits the scope of valid "regulatory fees" so that "if revenue is the primary purpose [of the exaction] and regulation is merely incidental, the imposition is a tax. ...In general, ... where it is exacted solely for revenue purposes and its payment gives the right to carry on the business without any further conditions, it is a tax." *Pennell v. City of San Jose* (1986) 42 Cal.3d 365, 375; *United Business Com. v. City of San Diego* (1979) 91 Cal.App.3d 156, 165. Here, there is not even a pretense of a "regulatory" function involved in the proposed pass-though of costs from the regional COGs, as they have no role in regulating individual lousing development projects, In addition, the legislative history of new section 65548.1 shows a clear intention on the part of the State simply to create the illusion of a possible new local revenue source so that the State may renew its argument that it need no longer reimburse the costs imposed on COGs in complying with the State mandate for determining regional housing needs, A "fee" in any amount imposed by the cities and counties would therefore improperly exceed the "reasonable costs" of non-existent regulatory services provided, would bear no reasonable relationship to my social or economic "burdens" on the cities or counties generated by housing developers, and would purely be for revenue purposes, making any such imposition an unauthorized and invalid "tax." *Beaumont Investors v. Beaumont – Cherry Valley Water District* (1985) 165 Cal.App.3d 227,235,

D. There Is No "Nexus" Between Any New Residential Development Project and the Costs Incurred by Regional COGs In Complying With the State Mandate to Determine Regional Housing Needs:

---

4 See, e.g, Government Code sections 66016,54990; 76 Ops. Cal. Atty. Gen. 4 (1993).

Yet another fundamental and constitutional impediment to the Commission's consideration of new section 65584.1 as providing authority for COGs seeking to recover their costs from builders or buyers of new homes is the absence of any nexus or reasonable relationship between the costs incurred by the COGs and any "impacts" attributable to new development. As noted above, the COGs are mandated to continuously determine and update the housing needs of their respective regions, independently of any particular development project or level of development activity. Indeed, there may even be an inverse relationship between housing development and the work of the COGs: the more new housing that is being created in a particular community, the more likely it is that the housing needs of that community are being addressed.

"Where the conditions imposed [on development] are not related to the use being made of the property but are imposed because the entity conceives a means of shifting the burden of providing the costs of a public benefit to another not responsible for or only remotely or speculatively benefiting from it, there is an unreasonable exercise of the police power." *Liberty v. California Coastal Commission* (1980) 113 Cal.App.3d 491, 502.

The constitutional requirements that there must be a reasonable nexus between development activity and any attempt to impose exactions as a condition of that activity have been reemphasized in recent U. S. and California Supreme Court decisions, as well as in State legislative enactments. See, e.g., Government Code sections 66000 et seq., *Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854; *Nollan v. California Coastal Commission* (1987) 483 U. S. 825; *Dolan v. City of Tigard* (1994) 512 U. S. 374. The absence of any nexus should preclude the Commission from giving any credence to the argument that some new "fee" may serve as a valid means of shifting the burden of providing the community-wide public benefit of regional housing needs assessments and implementation to the builders or purchasers of new homes.

Thank you for affording us this opportunity to present the concerns of the CBIA, and we appreciate your consideration of this response,

Please add us to the mailing list for this matter. Our email address is: dlanferman@sheppardmullin.com. We look forward to continued participation in this process as it moves Forward,

Very truly yours,

David P. Lanferman
SHEPPARD MULLIN RICHTER AND HAMPTON

cc: Nicholas J. Cammarota, Esq.
California Building Industry Association